STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff/Appellee

Supreme Court No. 155245

Court of Appeals No. 326311

Lower Court # 14-009512-01-FC

vs.

ELISAH KYLE THOMAS,

Defendant/Appellant

_____/

WAYNE COUNTY PROSECUTOR
Attorney for Plaintiff/Appellee

_____

KATHY H. MURPHY (P 51422)
PATRICK E. NYENHUIS (P 76343)
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_____

DEFENDANT-APPELLANT'S SUPPLEMENTAL BRIEF BY DIRECTION OF THE COURT'S ORDER OF JUNE 7, 2017

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STATEMENT OF QUESTIONS PRESENTED

I. Was the single photographic identification of Mr. Thomas so impermissibly suggestive that it gave rise to a substantial likelihood of misidentification?

The Trial Court answers, "Yes."

The Court of Appeals Majority answers, "No."

The Court of Appeals dissent answers, "Yes."

The Defendant/Appellant answers, "Yes."

II. Did the complainant have an independent basis to identify Mr. Thomas in court?

The Trial Court answers, "No."

The Court of Appeals Majority did not answer.

The Court of Appeals dissent answers, "No."

The Defendant/Appellant answers, "No."

JUDGMENT APPEALED FROM AND RELIEF SOUGHT

This case arises from the identification of Defendant/Appellant Elisah Kyle Thomas ("Mr. Thomas") obtained when an inexperienced Detroit Police Department patrol officer showed a single cell-phone photograph of Mr. Thomas to the hospitalized victim in the hospital, who was awaiting treatment for a gunshot wound that Mr. Thomas was later charged with inflicting.

Wayne County Circuit Court Judge Catherine L. Heise suppressed the pretrial identification, finding that it was unduly suggestive and unnecessary. She also suppressed the later in-court identification, finding that that it had no basis independent of the previous improper identification. (See Exhibit 1, Opinion and Order Granting Defendant's Motion to Suppress Identification, dated February 6, 2015.)

The Wayne County Prosecutor appealed Judge Heise's ruling to the Court of Appeals, which reversed her ruling in a split decision. *People v Thomas*, unpublished opinion of the Court of Appeals, entered December 8, 2016 (Docket 326311).

The Court of Appeals majority held that the single photographic identification was not impermissibly suggestive and was not subject to suppression as a violation of due process because the police could have attempted an on-the-scene identification if the victim had not been in need of immediate medical care, and showing a single cell phone photograph to the victim at the hospital was not so impermissibly suggestive as to violate due process. The majority did not address whether the later in-court identification should have been suppressed.

In contrast, Judge Shapiro in his dissent concluded that the trial court's findings of fact were not clearly erroneous and that its rulings were correct as a matter of law. He noted

that "the trial court conducted a thorough evidentiary hearing, made factual findings as to the totality of the circumstances consistent with the evidence and correctly applied the law." *People v Thomas*, unpublished opinion of the Court of Appeals, entered December 8, 2016 (Docket 326311), p 1 (Shapiro, J., dissenting).

WHEREFORE, as discussed in detail in the remainder of the application, Mr. Thomas asks that this Honorable Court reverse the decision of the Court of Appeals and affirm the dismissal of his case by the trial court.

Respectfully submitted,

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Dated: September 1, 2017

STATEMENT OF FACTS

Elisah Kyle Thomas ("Mr. Thomas") was charged with one count of Assault with Intent to Murder in violation of MCL 750.83; one count of Robbery - Armed in violation of MCL 750.529; one count of Assault with Intent to Do Great Bodily Harm Less than Murder in violation of MCL 750.84; one count of Weapons - Dangerous Weapon - Carrying with Unlawful Intent in violation of MCL 750.226; one count of Weapons – Felony Firearm in violation of MCL 750.227b; and one count of Weapons - Carrying Concealed in violation of MCL 750.227.

After the preliminary examination held on October 31, 2014, the case was bound over to the Wayne County Circuit Court and assigned to the Honorable Catherine L. Heise. The defense filed a motion to suppress identification. A *Wade*[1] hearing was held on January 30, 2015. Judge Heise granted the defense motion to suppress on February 6, 2015, and an Order of Dismissal was entered on February 10, 2015. The prosecution appealed Judge Heise's order of February 6, 2015. In a split decision, the Court of Appeals, on December 8, 2016, reversed Judge Heise's order and remanded to the trial court for further proceedings.

The complaining witness, Dwight Dykes, testified at both the preliminary examination[2] and the evidentiary hearing. The testimony and evidence show that Mr. Dykes was shot and wounded on October 27, 2014, as he returned home from a Coney Island restaurant located at Greenfield and West Seven Mile Road in Detroit. (PET, 4-5; MT, 5) The incident occurred in the evening when it was dark. *Id*. Mr. Dykes was walking down Clarita Street toward Forrer Street when a person with a gun approached him and told Mr. Dykes to give him everything in

[1] *United States v Wade*, 388 US 218; 87 S Ct 1926; 18 L Ed 2d 1149 (1967).
[2] References to the preliminary examination transcript are abbreviated as "PET" and references to the motion hearing transcript are abbreviated as "MT."

his pockets. (PET, 5) Mr. Dykes gave the person $10.00, but the person kept demanding that Mr. Dykes give him everything. (PET, 7) The person fired two shots, one at the ground and one in the air, and Mr. Dykes ran across Clarita. (PET, 7) The assailant shot at him, wounding him in the left leg. (PET, 8) Mr. Dykes went to his church, which was nearby, where the pastor provided assistance and called an ambulance. Mr. Dykes was transported to Sinai-Grace Hospital. (PET, 9)

Mr. Dykes had seen the assailant walking down Forrer Street 10 or 15 minutes prior to reaching the Coney Island. (PET 9; MT, 12) This was the only time prior to the assault Mr. Dykes had seen the assailant. (PET, 9; MT, 7) The assailant wore a hood, thus Mr. Dykes could see the "outer part" of his assailant's face – eyes, eyebrows, nose and mouth. (PET, 10; MT, 5, 7) It was dark, the assailant was wearing all black, and Mr. Dykes could not identify the kind of pants the assailant wore or whether there were any logos on the clothing. (PET, 13) He did not observe the assailant's ears. (MT, 6) Mr. Dykes did not notice anything unusual about the person's appearance. (PET, 16; MT, 22)

Mr. Dykes recalled that about 15 minutes elapsed between the shooting and the time he was loaded onto the ambulance, and it took about 10 to 15 minutes to get to the hospital. (MT, 8) Within about 5 or 10 minutes, he spoke to a police officer, who showed Mr. Dykes one cell-phone picture. (PET, 17; MT, 9; see also Exhibit 2, photograph used at the motion hearing.) At the time he spoke to the officer, Mr. Dykes had not yet been seen by a doctor and he was still bleeding. The officer showed him the picture as he was being pushed to a hospital room. (MT, 10; 16-17) At the preliminary examination, Mr. Dykes had not been sure whether the officer was male or female. (PET, 17) At the motion hearing, he testified that the officer was a female. (MT, 8) When Mr. Dykes looked at the photo, he was not instructed to take a good look,

a second look or a third look. (MT, 23) Mr. Dykes stated that the police officer asked him, "was this the person who shot you?" (MT, 11) Mr. Dykes testified that the officer did not inform him the person in the photograph might not be the person, or how she obtained the photo. (MT, 17) Mr. Dykes said the person in the single photograph was his assailant. This was his first and only identification of the defendant outside a courtroom.

At the hospital, Mr. Dykes described the assailant as about 5'9" tall, weighing either 145[3] or 200 pounds, and "wearing all black." Mr. Dykes said that he "couldn't really see his facial hair." (PET, 16; MT, 46, 50-51) At the motion hearing, Mr. Dykes testified that he could see facial hair on the assailant. (MT, 14) When confronted with the contradiction, Mr. Dykes claimed that he could not really see facial hair, as the incident had happened so fast and his adrenalin was up. (MT, 15)

At the *Wade* hearing, Mr. Dykes testified that he first observed the assailant on Prevost Street for about three seconds, when he glanced at the person. (MT, 20) The area had no lighting. (MT, 20-21) The robbery encounter on Clarita lasted about six to seven seconds (MT, 6-7), during which time Mr. Dykes's "adrenalin was up," and the assailant was about two feet or half an arm's length from him. (MT, 7, 15) Again, there was no lighting in the area. (MT, 5) Mr. Dykes reiterated that he saw the person's face from forehead to chin, but could not see his ears. (MT, 5)

Officer Samellia Howell testified that she was dispatched to the scene with information that the suspect was described as a black male wearing dark clothing and having a youthful appearance. (MT 24, 31) She saw Mr. Thomas at the Exxon Mobil gas station at Greenfield and Clarita, about 50 feet away from the shooting site. (MT, 24-25, 35) He was

[3] At the preliminary examination, Mr. Dykes said the assailant was 145 pounds. (PET, 16) At the motion hearing, the police officer testified that Mr. Dykes told her the assailant was 200 pounds. (MT, 46, 50-51)

with another person. (MT, 38) Officer Howell testified she did not have probable cause to arrest Mr. Thomas, but she stopped him, got his name, patted him down and ran him through the LEIN (the Law Enforcement Information Network). (MT, 27-28) The LEIN gave Mr. Thomas's address and revealed that he had no criminal record. (MT, 28) Officer Howell took a single cell-phone photograph of Mr. Thomas. (MT, 28) She then went to Sinai-Grace, where Mr. Dykes was being treated. (MT, 30).

Officer Howell testified that Detroit Police Department procedure does not allow officers to take suspects to a hospital room for a showup identification. (MT, 36) There is no procedure allowing officers to show a cell-phone picture to a witness. (MT, 37) According to Officer Howell, Mr. Dykes told her that he had seen the assailant around the neighborhood. (MT, 31) She showed the single photograph to Mr. Dykes and asked him, "was this the guy who shot you?" (MT, 32) She testified that she did not indicate whether Mr. Thomas was in custody, or whether she thought Mr. Thomas was the person who had assaulted Mr. Dykes. (MT, 33) She stated that Mr. Dykes began to tear up and said, "that's him." (MT, 33-34) Officer Howell testified from page two of her report, which she had composed after speaking to Mr. Dykes, that the suspect was about 5'9" tall, weighed around 200 pounds, and was roughly between the ages of 15 and 20.[4] (MT, 46, 51) At the *Wade* hearing, Mr. Dykes testified that he told the officer that the assailant looked like him – he had the same complexion (dark) and was the same size, 5'9" tall and 145 pounds. The assailant had on a black hood but Mr. Dykes did not know what type of pants the assailant wore. (MT, 22-23)

As a patrol officer, Howell had no expertise in performing lineups and had never done a six-pack photo lineup. (MT, 44) There was no testimony regarding whether Officer Howell had asked Mr. Thomas to accompany her to the hospital.

[4] Judge Heise asked Mr. Thomas his height at the Motion Hearing and he said he was 5'8" or 5'9". (MT, 65)

Investigator Glenda Fisher was the officer in charge of the case. (MT, 53) Her duties as an investigator included composing six-pack photo lineups and conducting other identification procedures. (MT, 54) She also testified that the Detroit Police Department has no policy regarding cell-phone photograph identification. (MT, 54) The department has a computer program available that allows the investigators to compose photo lineups based on the similarity to a single available photo. (MT, 55) Driver's license photos as well as mug shots are available. (MT, 54-55) Photos from other sources, such as driver's licenses, tend to stand out in a photo lineup because they are different sizes and have backgrounds different from mug shots. (MT, 56-57) Showing a witness a photograph that stands out would single that person out. (MT, 57) Investigator Fisher was familiar with live lineup procedures. (*Id*.) She could not force anyone, whether they were in or out of custody, to participate in a live lineup. (MT, 57-58) In a situation where she had no suspect in custody, no mug shot to put in a six pack, no driver's license photo, and a suspect who refused to participate in a live lineup, her next avenue of identification might be to do a "drive-by." (MT, 57-58) If she knew, for example, that a suspect was standing on a street corner, she could put the complainant in a car and drive by the location so the complainant could say whether he or she either saw or did not see the person being sought. (MT, 57-58) This method was not used frequently by the Detroit Police Department. (MT, 59)

Investigator Fisher had never shown a witness a cell-phone picture. (MT, 62) Generally, she would only use a single photo for identification purposes, for example, when people live next door to each other and the person is named "Mary" – in other words, when people are known to each other. (MT, 63) The department also has no policy for showing one picture for identification purposes. (MT, 61) Showing someone one cell-phone picture

would single out the pictured person. She had never taken a picture of a suspect and shown it to a victim. (MT, 62)

ARGUMENT

I.

The single-photograph identification of Mr. Thomas was so impermissibly suggestive that it gave rise to a substantial likelihood of misidentification.

Standard of' Review·

"On review, the trial court's decision to admit identification evidence will not be reversed unless it is clearly erroneous. Clear error exists when the reviewing court is left with the definite and firm conviction that a mistake has been made." *People v Kurylczyk*, 443 Mich 289, 303; 505 NW2d 528, 534 (1993) (citations omitted).

The court reviews a trial court's decision to suppress identification evidence for clear error, but reviews underlying questions of law do novo. *People v McDade*, 301 Mich App 343, 836 NW2d 266 (2013).

Discussion

Whenever an identification procedure is so unnecessarily suggestive and conducive to irreparable mistaken identification that it denies due process of law, it must be suppressed. *Stovall v Denno*, 388 US 293, 302; 87 S Ct 1967; 18 L Ed 2d 1199 (1967); *People v Kachar*, 400 Mich 78, 90; 252 NW2d 807 (1977); *Manson v Brathwaite*, 432 US 98; 97 S Ct 2243; 53 L Ed 2d 140 (1977). A photographic identification procedure violates a defendant's right to due process of law when it is so impermissibly suggestive that it gives rise to a substantial likelihood of misidentification. US Const. AM XIV; Const 1963 art I sec 17; *People v Gray*, 457 Mich 107; 577 NW 2d 92 (1998); *Simmons v United States*, 390 US 377, 384; 88 S Ct 967, 971; 19 L Ed 2d 1247 (1968). When a witness is shown only one person or a group in which one person is singled out in some way, the witness is tempted to

presume that he is the person. *People v Anderson*, 389 Mich 155; 178, 205 NW2d 461, 470 (1973) (overruled on other grounds). The exhibition of a single photograph is "one of the most suggestive photographic identification procedures that can be used." *Gray*, 457 Mich at 11, citing Sobel, Eyewitness Identification (2d ed), §5.3(f), page 5-42. The United States Supreme Court has stated that the risks inherent in identification are not the "result of police procedures intentionally designed to prejudice an accused," but rather derive "from the dangers inherent in eyewitness identification and the suggestibility inherent in the context of pretrial identification." *Wade*, 388 US at 235.

The suggestiveness of an identification procedure is determined by considering the totality of the circumstances surrounding the procedure. *Stovall*, 388 US at 301-302; *People v Lee*, 391 Mich 618, 626; 218 NW2d 655 (1974). In ascertaining whether a pretrial identification procedure is impermissibly suggestive, a court must look to the totality of the circumstances, especially the time between the criminal act and the procedure, and the duration of the witness's contact with the perpetrator during commission of the offense. *People v Johnson*, 58 Mich App 347, 352-355; 227 NW2d 337 (1975); *Neil v Biggers*, 409 US 188, 199; 93 S Ct 375; 34 L Ed2d 401 (1972).

No identification procedure, photographic or corporeal, whether the accused is in custody or not, may be unnecessarily suggestive and conducive to irreparable misidentification. *Anderson*, 398 Mich at 168-169. An identification procedure is flawed if it tends to suggest the response desired, *People v Prince*, 54 Mich App 699, 702; 221 NW2d 596 (1994), so as to create a "very substantial likelihood of irreparable misidentification." *Neil v Biggers*, 409 US at 198.

A defendant's right to due process includes the right not to be the object of suggestive police identification procedures that make an identification unreliable. *Manson v Brathwaite*, 432 US 113-114. An identification procedure may be deemed unduly or unnecessarily suggestive, if it is on police procedures that create "a very substantial likelihood of irreparable misidentification." *Perry v New Hampshire*, 565 US 228, 238; 238 132 S Ct 716, 720; 181 L Ed 2d 694 (2012) (quoting *Simmons v United States*, 390 US at 384-385). As the United States Supreme Court noted, one-on-one show-up identification procedures have been "widely condemned" because they are inherently suggestive. *Stovall v Denno*, 388 US at 302.

In the current case, the photograph itself increases the suggestive nature of a single picture. Mr. Thomas is clearly pictured in the area where the incident occurred. The photo was presented to Mr. Dykes within an hour of the shooting. What could Mr. Dykes conclude, except that the police had already apprehended and photographed the assailant? Were the police going to show him photographs, one by one, of people they did *not* believe were involved in the incident just to rule them out? Why would the police rush to the hospital to do that? If the police did not think that Mr. Thomas was the assailant, why did they rush to the hospital to show Mr. Dykes the single photograph?

The prosecution argued below that, because the cell-phone photo was shown to Mr. Dykes within an hour of the assault, the victim's identification by way of the sole photograph was the functional equivalent of a "showup," like *Stovall v Denno*. In *Stovall*, the police brought the handcuffed defendant to the hospital, where he was shown to the seriously injured victim, and where he was directed to, and did, repeat a

few words for voice identification. *Stovall*, 388 US at 295. The *Stovall* Court, while upholding the victim's identification of her assailant at an in-hospital "showup," recognized that "the practice of showing suspects singly to persons for the purpose of identification" has been "widely condemned". *Stovall*, 388 US at 301. The *Stovall* Court explained that a claimed violation of due process of law depends "on the totality of the circumstances surrounding it." *Id*. The *Stovall* Court noted the need in that case for immediate action, that the victim might die, and that bringing the defendant to the victim was the only "feasible procedure." *Id*. In addition, the identification was not merely visual, it was also by voice.

However, the prosecution did not cite any case law that explicitly equates a photographic identification with a "showup." Indeed, there is none and the Detroit Police Department has no such procedure. There is no legal authority to support that temporal proximity between the crime and the exhibition of a single photograph by itself overcomes the constitutional infirmity of impermissible suggestiveness. Contrary to the prosecution argument, the trial judge did not find that such a procedure would never be acceptable. Rather, the trial judge properly found, taken as a whole, that the facts in the present case did not call for such action. There was no showing of the mortal exigency that was critical to the analysis in *Stovall*.

The Court of Appeals Opinions

The Court of Appeals reversed the trial court's ruling in a split decision. The decision of the Court of Appeals majority should be reversed for the reasons set forth in the dissent and set forth below.

The majority cited *People v Hallaway*, 389 Mich 265, 282; 205 NW2d 451 (1973), for the proposition that a one-person confrontation is not per se a violation of due process, and *People v Winters*, 225 Mich App 718, 725; 571 NW2d 763 (1997), for the proposition that a one-person confrontation may be reasonable practice to determine if a suspect is involved in a crime. *People v Thomas*, unpublished opinion of the Court of Appeals, entered December 8, 2016 (Docket 326311), p 3 (hereinafter styled "*Thomas*, majority at –").

The majority stated that the "relevant inquiry is whether the identification process was unduly suggestive in light of all of the surrounding circumstances, including (1) the opportunity of the witness to view the criminal at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description of the criminal, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation. *Kurylczyk*, 443 Mich at 306 (opinion by GRIFFIN, J.). The question is 'whether under the 'totality of the circumstances' the identification was reliable even though the confrontation procedure was suggestive.' *Neil v Biggers*, 409 US 188, 199; 93 S Ct 375; 34 L Ed 2d 401 (1972)." *Thomas*, majority at 3 (footnote omitted).

As Judge Shapiro noted in his dissent, neither *Neil* nor *Kurylczyk* involved a single-photo identification. *Thomas*, dissent at 10. *Neil* concerned an in-person live showup (*Neil*, 409 US at 195) and *Kurylczyk* involved a six-photo array (*Kurylczyk*, 443 Mich at 293). *Id*. Neither *Neil* nor *Kurylczyk* is even factually applicable to this case and whether it is proper even to consider the factors applicable to the facts in those cases is not at all clear. *Id*. For the sake of argument, however, the factors will be reviewed below in light of the cases cited by the majority.

The majority cited *People v Woolfolk*, 304 Mich App 450; 848 NW2d 169, aff'd 497

Mich 23; 857 NW2d 524 (2014), a case where the Court of Appeals upheld a single-photo identification under circumstances very different from those in this case. In *Woolfolk*, the witness was shown a single photograph of the defendant, who was a person well-known to the witness. The Court of Appeals held that:

> the photograph was used only to help confirm the identity of the person the witness had *already identified*—using a nickname—as the shooter. The witness testified that he knew, and grew up with, the shooter. Under these circumstances, the use of a single photograph did not create a substantial likelihood of misidentification and, therefore, did not violate defendant's right to due process.
>
> *Woolfolk* at 457-58 (emphasis added).

Woolfolk differs significantly from this case. *Woolfolk* was not a stranger identification case. Unlike the witness in *Woolfolk*, Mr. Dykes had not already named his assailant by nickname. Although the police officer claimed that Mr. Dykes had told her that he knew the assailant from the neighborhood (MT, 31, 39), Mr. Dykes himself testified that he had seen the assailant only once before the robbery, that being when he had passed him on the street ten minutes before the robbery. (MT, 13, 16, 23) The degree of familiarity set forth in *Woolfolk* was never alleged in this case. Mr. Dykes himself never said he that knew Mr. Thomas and he most certainly did not say that he had grown up with Mr. Thomas. *Woolfolk* is not apposite to this case.

The majority misstated the holding of another case involving a single-photo, *People v McAllister*, 241 Mich App 466, 472; 616 NW2d 203 (2000).[5] The majority stated that the Court of Appeals concluded that the single-photo identification of the defendant had been suggestive, but permissible. That was not the holding in *McAllister*.

[5] Remanded in part on other grounds 465 Mich 884 (2001)

In *McAllister*, the police did not have a mug shot of the defendant. *McAllister*, 241 Mich App at 472. Rather, the only photograph of defendant that the police had was of the defendant on a boat. *Id.* Believing that an array using that photo would have been impermissibly suggestive, the police showed the witness the single photograph of the defendant on the boat. The witness later identified the defendant in court. *Id.* The defendant challenged the independent basis for the in-court identification, alleging it was tainted by the showing of the single photograph. *Id.*

The majority stated that the *McAllister* Court found the pretrial identification acceptable, which is not what was said. The *McAllister* Court upheld the in-court identification *despite* the improper pretrial identification:

> However, when a *pretrial* identification has been *improperly* conducted, an *independent basis* for any *in-court* identification must be established. [*People v Gray*, 457 Mich at 114–115, 577 N.W.2d 92.] In the present case, Webb testified that there was an independent basis for his identification because he could not recall ever being shown a photograph of defendant by police. Rather, Webb testified that the distance, daylight, and duration surrounding the circumstances of the assault was sufficient to allow him to identify defendant, who had in Webb's opinion, attempted to alter his appearance at the time of trial. *People v. Kachar*, 400 Mich. 78, 83, 252 N.W.2d 807 (1977). Accordingly, we cannot conclude that the trial court's decision to admit identification evidence was clearly erroneous. *Kurylczyk, supra."*
>
> *McAllister*, 241 Mich App at 472–73 (emphasis added).[6]

The majority discussed *People v McRaft*, 102 Mich App 204, 211; 212 n 2; 301 NW2d

[6] The standard of review utilized by the *McAllister* Court was as follows: "The trial court's decision to admit identification evidence is reviewed for clear error." *People v McAllister*, 241 Mich App 466, 472; 616 NW2d 203, 206 (2000), remanded in part, app den in part 465 Mich 884; 636 NW2d 137 (2001).

Ironically, the citation for the clear error standard is *People v Kurylczyk*, 443 Mich 289, 303, 505 NW2d 528 (1993), where this Court applied the *Neil* live showup factors to the scrutiny of a six-photo array identification procedure. Another irony in using *Kurylczyk* is that the defendant there challenged the photo of him in the six pack as being impermissibly suggestive because it singled him out. There is no six pack in this case. Mr. Thomas could not possibly be singled out anymore than he has already been by the showing of one single photograph of him to the witness.

852 (1980), in which a hospitalized victim was shown three photographs and identified the third one as the defendant, as if to say that all such procedures are acceptable. The facts of *McRaft* are very different from the case at bar. (They are also different than as set forth by the majority in this case. See below.) In *McRaft*, unlike this case, the incident occurred during the afternoon, not at night on an unlit street. In addition, the victim in *McRaft* spent much more time with his assailant than in the case at bar. The victim in *McRaft* was the driver and sole occupant of a car

> waiting at the traffic light at the corner of Mack and Hastings when someone, whom he identified as the defendant, opened the passenger door and entered the car. Continuing his testimony, he said that she told him to give her his money and, that when he answered that he had no money, she stated that she would "cut off (his) mother fucking head * * * ". The complainant testified that he had observed that she had her hands inside the pockets of her jacket and that he "figured she had something", however, he saw no weapon at that time. Mr. Barrow related that the assailant then "hit" him in the throat and fled ….

McRaft, 102 Mich App at 206–07. This interaction undoubtedly took much longer than six or seven seconds, unlike the case at bar.

The victim in *McRaft* had been stabbed in the throat and had lost a lot of blood. *McRaft*, 102 Mich App at 207-08. At some point during the victim's hospitalization, a police officer went to the hospital and showed the victim numerous photographs. The victim identified the third one, a photograph of the defendant, as his assailant.[7] *McRaft*, 102 Mich App at 212, n. 2. On appeal, the defendant alleged that "the complainant's weakened condition at the time of the photographic showup gave rise to a very substantial likelihood of misidentification, requiring suppression …." *McRaft*, 102 Mich App at 211. The majority states that the *McRaft* Court did not find the procedure impermissible suggestive even though the victim had been shown only

[7] The majority states that the victim was shown only two photographs and identified the second one as the defendant. *Thomas,* majority at 4.

two photographs. *Thomas*, majority at 4.

Again, *McRaft* differs from this case. In *McRaft*, the victim testified that he identified the defendant from a group of seven photographs shown to him in the hospital. *McRaft*, 102 Mich App at 207. After seeing three photographs, of three different people,[8] the victim identified the third photograph as the defendant. *McRaft*, 102 Mich App at 212 n 2. (It is not known whether the other four photographs were then shown.) No one was singled out in the process used in *McRaft*. In this case, only one photograph was shown. There is not really any other way to single someone out more than by showing only that person's photograph. In any event, the *McRaft* Court was most focused not on the photographic display procedure but on the issue actually raised in *McRaft*, that being whether the victim's weakened state gave rise to a very substantial likelihood of misidentification requiring suppression. The *McRaft* Court most certainly did not hold that a single-photograph identification in a hospital is permissible.

The *Thomas* majority itself noted that "the showing of a single photograph is virtually always suggestive." *Thomas*, majority at 4. To determine whether the showing of the single photograph in this case was impermissibly suggestive, the majority decided to consider the categories of circumstances outlined in *Neil* and used in *Kurylczyk*, cases that are not factually comparable to this case and the applicability of which are far from clear, as noted by Judge Shapiro in his dissent. *Thomas*, dissent at 10. *Neil* involved a live showup and *Kurylczyk* involved a six-photo array. In any event, the factors are discussed below.

Opportunity to view the assailant: The majority noted the following: that the victim saw the assailant twice – the first time was a three-second glance and the second time was for six or

[8] It is assumed that the photographs were of different people because the victim described the first two as being of light-skinned people and the third being of a dark-skinned person. *McRaft* at 212 n 2.

seven seconds; that the victim and the assailant were within two feet of each other during the robbery; that the victim testified that he got a good look at the assailant's face; that it was dark; that the victim said he was able to look at the face, clothing and gun; and that the victim consistently described the assailant as young, dark-skinned, 5'9" tall and wearing a black hood. The majority noted the discrepancy in the description of weight, 145 vs. 200 pounds. The majority said that the victim had the opportunity to observe his assailant but conceded that the observation time was short. *Thomas*, majority at 4-5.

As Judge Shapiro noted, however, although the majority said it had been dark, the majority failed to acknowledge the lack of street lighting and that the assailant's hair, ears, and part of his forehead and cheeks had been covered by a hood. *Thomas*, dissent at 10. The angle of the photograph, a side or three-quarter view, is also different than the head-on angle that the victim testified about. (See Exhibit 2.) Judge Shapiro noted that this Court unanimously held in *Gray* that a single-photograph identification was unduly suggestive even where the victim had spent over an hour with the assailant, who had raped the victim not once but twice and whom the victim had seen in both artificial and natural light. *Gray*, 457 Mich 111-114, 117-119.

Witness's degree of attention: Instead of noting that the victim's attention was divided among the gun, the clothing and the face, as Judge Shapiro noted in his dissent (*Thomas*, dissent at 12), the majority stated that the victim "was able to note" size, age, skin-tone, clothing color, color and kind of gun being used, and that the gun was in the assailant's right hand. *Thomas*, majority at 5.

Accuracy of prior description: The majority asserted that "there is no dispute that the victim's description matched the defendant," yet it is not clear to which description the majority

refers: the description of the assailant as 145 pounds, or 200 pounds? The description of the assailant as having no facial hair, or as having peach fuzz? The trial court noted that the victim's description "shifted subtly" from the preliminary examination to the evidentiary hearing. (Exhibit 1 at 9.) The majority conceded that the victim's description was general, but said it was "accurate." *Thomas*, majority at 5.

Level of certainty at the time of identification: The majority stated that the victim identified the person in the photo as the assailant within a few seconds after seeing the photo and that he had an emotional reaction. However, the victim had not yet been seen by a doctor, and he was being pushed to another room as he was being shown a photograph that was only four inches tall and not as wide (MT, 32), that depicted the top half of Mr. Thomas's body and not just his face (see Exhibit 2). To make matters worse, the victim was bleeding. The emotional reaction could have been to the whole situation, not necessarily just to the photograph. The officer who showed Mr. Dykes the photograph was equivocal. She thought the emotion was both "like, shocked or, just – this is the guy." (MT, 34). The majority stated that the victim never failed to identify the defendant and never identified anyone else. *Thomas* majority at 5. This bold statement is not borne out by the facts. The victim never had the opportunity to identify anyone else. He was shown one picture, and thereafter, he saw the defendant in court at the defense table.

Length of time between crime and confrontation: The majority noted that the time between the crime and the identification of defendant was between 30 minutes to an hour. *Thomas* majority at 5.

With respect to the circumstances of the showing of the photo to the victim, the majority

stated that the officer asked "was this him," but that she did not state the pictured person was the assailant or that he was under arrest. Thomas majority at 5. The majority stated that the photo is merely a color photograph of a young man standing near a building, but does indicate that the person was under arrest. *Id*. The majority ignored that the photograph was taken near the scene of the robbery, which is highly suggestive. In addition, there need not have been evidence that the pictured person was under arrest for the victim to believe that the police thought that the pictured person was the perpetrator.

The majority then stated that a single-photograph identification was comparable to a live, on-the-scene showup and disagreed with the trial court's assertion that the two cannot be analogized. *Thomas* majority at 5. The majority discussed the circumstances of several live showup cases and compared them to this case. *Thomas*, majority at 5-6.

These comparisons are inapposite for several reasons. First, the circumstances of the cases are very different.

In the first of these cases, *People v Libbett*, 251 Mich App 353, 361; 650 NW2d 407 (2002), the victim had been carjacked by two people. *Libbett*, 251 Mich App at 355. Those two picked up another two individuals. *Libbett*, 251 Mich App at 356. All four were apprehended and taken back to the scene of the carjacking. *Id*. The victim was taken back to the scene, where he saw and identified the two carjackers. *Libbett*, 251 Mich App at 356-357. The very obvious difference between *Libbett* and this case is that the victim viewed four people, not just one. The other very obvious difference is that the victim could presumably see the entire bodies of all four of the suspects, in person and in three dimensions – the victim was not looking only at a flat, two-dimensional image of half of their bodies. There was no singling out in *Libbett*. The

singling out is what gives rise to the impermissible suggestiveness in this case.

The majority also discussed *Neil*, 409 US at 195, where the victim identified the defendant after a live showup. The circumstances of the victim's observation of the defendant in *Neil* were much different than here. The victim in *Neil* had spent at least a half hour with the defendant, who had raped her. *Neil*, 409 US at 193. Thus, she had been horrifyingly close to the defendant for a much longer period than the victim in this case. The victim in *Neil* had seen the defendant flooded in the light from a room in her house, as well as under the full moonlight. *Neil*, 409 US at 193-195. He had spoken to her during the crime and he spoke during the live showup (*Neil*, 409 US at 195) as well, so hers was not merely a visual identification of a live person, but both a visual and a voice identification of a live person.

Finally, the majority minimized the great disparity between a flat, partial photograph and seeing a live person's entire body in person. The majority failed to acknowledge the trial court's excellent discussion of the differences in perspective that exist between viewing a live suspect, where the witness can see the person's build and height, and viewing a flat cell phone picture, where build and height are not visible. (MT, 77) The majority conceded that such viewings are not the same, saying that each had its hazards, but the majority believed that the harm to be guarded against was singling out, which could occur in person or with photographs. *Thomas*, majority at 6. The majority's minimizing of the differences between photographs and live viewings aside, if the majority was so concerned with singling out, how can it fail to acknowledge the dangerous degree of singling out inherent in showing a witness just one photograph of one person, who was a stranger? What was Mr. Dykes to think? That the police would show him a single photograph every hour, in order to eliminate potential suspects? What

else was the witness to think but that the police had apprehended the person in the photograph and that they thought they had their man?

The majority said that the single-photograph identification in this case was like an on-the-scene identification and that such an identification could have been accomplished had the victim not been in the hospital. *Thomas* majority at 6-7. That is not necessarily true. Mr. Thomas was not in custody and would have been under no obligation to remain at the scene where the police encountered him. However, it begs the question whether Mr. Dykes would not have identified Mr. Thomas under those circumstances.

The prosecutor argues in its supplemental brief that on-the-scene identification procedures in the immediate aftermath of a crime are necessary and that the resulting identifications do not violate due process. However, all of the cases cited by the prosecutor for this proposition involve live showups or identifications from a multitude of photographs, not just one. They do not involve the use of a single cell-phone photograph shown to a victim in the manner and under the circumstances present in this case. They are all distinguishable so as to be inapposite.

In *United States v King*, 148 F3d 968 (CA 8, 1998), the car-theft victim was transported 40 minutes after a carjacking to a scene where she viewed four live suspects. Out of the four, the victim unequivocally identified the defendant and two others as having participated in the carjacking. *Id*. at 969-970. The obvious difference between King and this case is that the victim chose the defendant from among four live human beings while she was sitting well-protected in a police car. She did not choose the defendant from a single cell-phone photograph shown to her while she was hospitalized in great distress.

In *United States v Nelson*, 931 F Supp 194, 198 (WD NY, 1996), two police officers chased the defendant on foot. *Id*. at 197. The defendant was apprehended by a third officer, who took the defendant back to be viewed by the two officers who had chased him just moments earlier. *Id*. Those two officers identified the defendant at that time as the man they had chased. *Id*. The obvious difference here is that the officers viewed the defendant, whom they had just been chasing, in the flesh, rather than on a small, flat screen.

Of interest is the following statement by the district court, when finding that the procedure had not been unduly suggestive: "This was not a case in which the police apprehended a suspect and then brought him to a crime victim." *Nelson*, 931 F Supp at 199.

In *Summitt v Bordenkircher*, 608 F2d 247 (CA 6, 1979), aff'd in *Watkins v Sowders*, 449 US 341; 101 S Ct 654; 66 L Ed 2d 549 (1981), the victim had ample opportunity to view her assailant, she provided a detailed and accurate description of her assailant, and she identified the defendant "from among a multitude of police photographs that were presented in a neutral fashion." *Id*. at 252. The court held that pretrial identification was not improper. *Id*. The obvious difference between *Summitt* and this case is that the victim chose the defendant from a multitude of photographs presented in a neutral fashion, not just one shown to her while she bleeding and being pushed to a hospital room.

In *New Jersey v Herrera*, 187 NJ 493, 505; 902 A2d 177 (NJ, 2006), the victim of a car-jacking was taken to a hospital emergency room for a live viewing of the defendant, whom the victim immediately identified. *Herrera*, 187 NJ at 497. The victim testified that while he was being treated at the hospital, a police officer told him they had located his car and that they would take him to the hospital to identify the person. *Herrera*, 187 NJ at 506. The police had

also said to him that they had located his car with someone in it and they wanted him to go with them to identify the person. *Id.* He also testified that while at the police station, an officer said the person was in the hospital and they would take the victim to the hospital to identify the man. *Id.* An officer testified that he told the victim they had found his car and they were going to let him look at the occupant. *Id.* The court found the showup impermissibly suggestive. *Id.* However, the court found the in-court identification to have been reliable because the victim had seen the defendant around the area almost daily, the victim had had ample opportunity to view the defendant during the crime, the victim's identification was quick, and the lapse of time between the crime and the identification was reasonable. *Herrera*, 187 NJ at 508.

The identification procedure in *Herrera*, a corporeal one-person showup, was condemned as impermissibly suggestive. The in-court identification was found reliable, however, because the victim had had ample opportunity to view the defendant during the crime and had seen the defendant almost daily previous to the crime, circumstances not present in this case.

In *Illinois v Lippert*, 89 Ill2d 171, 188; 432 NE2d 605 (Ill, 1982), the defendant moved to suppress an identification made at a live showup. Approximately 55 minutes after an armed robbery by four men, the victims viewed and immediately identified the defendant upon seeing him and an accomplice sitting in the back of a police car. *Lippert*, 89 Ill2d at 174-176. One of the victims stated during the identification that one of the robbers had complained about an injury to his finger, whereupon a police officer checked the defendant's hands and found stitches in the defendant's little finger. *Lippert*, 89 Ill2d at 176. The court in *Lippert* affirmed the trial court's denial of the suppression motion, finding the identification reliable. *Lippert*, 89 Ill2d at 188. The court noted that one of the victims had spoken to the defendant and both victims had

had ample time to view the defendant, one of them for several minutes. *Id*. In addition, one of the robbers had complained about a cut on his finger and the defendant had stitches on his little finger. *Id.* Finally, the court found that 55 minutes was a relatively short time between the crime and the identification. *Id*.

The *Lippert* case was a corporeal showup and it turned on the reliability factors. The fact that one of the perpetrators had complained about a cut on his finger and the defendant had stitches on his little finger cannot be underestimated.

In *Hobbs v Alabama*, 401 So2d 276, 279 (Ala Crim App, 1981), the victim was raped by several men, over a period of one to two hours; the men then threw her in some bushes and left. *Hobbs*, 401 So2d 279. Although the lighting was not good, she had been able to see because of the closeness and the length of time. *Id*. She made her way to the police station and told police that one of the perpetrators had a beard and they had driven off in a light blue Cadillac. *Id*. The police began searching the area and found two men were found near the scene in a light blue Cadillac. *Id*. The police took the victim to the scene approximately one and half hours after the incident to view the men. *Id*. Her towel was in the Cadillac. *Id*. She viewed the appellants and identified both. *Id*. She identified the appellant with the beard with one hundred percent certainty. *Id*. She was not as sure about the other appellant. *Id*.

The court found that the identification procedure was suggestive but that the identification had been reliable. *Hobbs*, 401 So 2d at 280. The victim had viewed the appellants at close range for a period of one to two hours. *Id*. There had been sufficient light and the appellants were "right in [her] face." *Id*. Her description was that one had a beard and that they were in a blue Cadillac. *Id*. However, within a short period of time they were found at the scene

of the rape and the victim was taken there to view them. *Id*. When she viewed them, they were standing beside a blue Cadillac which contained her towel. *Id*. The identification took place approximately one and one-half hours after the rape. *Id*. She was one hundred percent certain of her identification of one but not the other. *Id*.

The difference between *Hobbs* and this case make it inapposite. There, the showup was live, the victim had been in close proximity to the perpetrators for one to two hours, the perpetrators were found at the scene of the rape, shortly after it occurred, in the same model and color of car that the victim had described, and her towel was in that car.

In *Young v Alaska*, 374 P3d 395, 421 (Alaska, 2016), the Alaska Supreme Court adopted a new test for determining the reliability of an eyewitness identification.[9] *Young*, 374 P3d at

[9] First, the *Young* Court discussed the scientific understanding of the factors affecting eyewitness identifications has evolved since *Manson v Brathwaite*:

> The science of human memory developed since *Brathwaite* shows that memory does not function like a videotape, on which events are simply stored linearly to be recalled later in the same linear way. Instead, there are three major stages of memory and recall. First, in the acquisition stage, "the event is perceived by a witness, and information is entered into the memory system"; second, in the retention stage, "some time passes before a witness tries to remember the event"; finally, in the retrieval stage, "the witness tries to recall the stored information." Eyewitness memory is malleable, and many factors can affect the reliability of a memory at each stage of the process of recalling it. And as the court of appeals noted in *Tegoseak v. State*, a mistaken identification at the beginning of a criminal investigation can "become" the witness's memory for purposes of all subsequent identifications; the erroneous picture displaces the fact.
>
> Scientific literature often divides the factors that can affect the reliability of eyewitness identifications into two categories: "system variables," which are manipulable and can be influenced by the criminal justice system (such as the instructions given a witness during a lineup); and "estimator variables," which cannot be influenced by the criminal justice system because they are related to environmental conditions and personal characteristics (such as the stress of the moment). In replacing the *Biggers* factors with a list that draws on these two categories of variables, we follow most closely the New Jersey and Oregon supreme courts' decisions in *State v. Henderson* and *State v. Lawson*. Like those courts, we recognize that the science of eyewitness identifications is "probabilistic"; it cannot say for certain whether any particular identification is accurate but rather identifies the variables that are relevant to evaluating the risk of a misidentification.

Young, 374 P.3d at 416–17 (citations and footnotes omitted)

The *Young* Court set forth a new test for evaluating eyewitness identification procedures:

427. The *Young* Court discussed showups:

> A "showup" is an identification procedure in which a witness is presented with a single suspect and asked if the suspect is the person who committed the crime. Alaska courts have long restricted the use of showups as an identification procedure to where it is necessary under the circumstances. The problems with showups are apparent: in contrast to lineups and photo arrays, which allow a witness with a faulty memory to pick someone other than the suspect, every positive identification in a showup implicates the suspect. Showups seemingly provide little protection against witnesses who are inclined to guess, as witnesses participating in showups tend to base their identifications on clothing. Research shows that an innocent suspect who resembles the actual perpetrator is more likely to be incorrectly identified in a showup than in a lineup.
>
> Showups can be reliable when they are conducted immediately after a crime, when the witness's memory is freshest; but research shows that the likelihood of a

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> First, to be entitled to an evidentiary hearing on the issue, the defendant must present "some evidence of suggestiveness that could lead to a mistaken identification." This proffer must "be tied to a system—and not an estimator—variable," consistent with the principle of due process law that only state action triggers constitutional protections. We emphasize that a defendant need not show that a procedure was "unnecessarily suggestive" in order to get a hearing; that the identification involved a system variable is itself enough to trigger that process.
>
> At the hearing the State must present evidence that the identification is nonetheless reliable. The superior court's ensuing analysis of reliability should consider all relevant system and estimator variables under the totality of the circumstances. Although the variables to consider include those discussed above, we emphasize that the list is non-exclusive; the scientific understanding of eyewitness memory continues to evolve. Because of this, trial courts should not hesitate to take expert testimony that explains, supplements, or challenges the application of these variables to different fact situations.
>
> Although the defendant must only identify a relevant system variable in order to obtain a hearing, the defendant retains the burden of proving at that hearing a "very substantial likelihood of irreparable misidentification." If the defendant meets this burden, the trial court should suppress the evidence—both the pretrial identification and any subsequent in-court identification by the witness. If the defendant does not meet the burden, however, the court should admit the evidence and provide the jury with an instruction appropriate to the context of the case, which we discuss in greater detail below.
>
> Of course, nothing has altered the State's burden of proving at trial the identity of the accused as the person who committed the charged offense beyond a reasonable doubt.
>
> **4. Jury instructions should take into account this new test for the reliability of eyewitness identifications.**
> If eyewitness identification is a significant issue in a case, the trial court should issue an appropriate jury instruction that sets out the relevant factors affecting reliability.

Young, 374 P.3d at 427–28 (footnotes omitted).

> misidentification increases significantly with showups as little as two hours after the event.

Young, 374 P.3d at 420–21 (footnotes omitted).

In *Oregon v Lawson*, 352 Or 724, 742; 291 P3d 673 (Or, 2012), the Oregon Supreme Court underwent an evaluation of the state's eyewitness identification procedure case law similar to the evaluation in *Alaska v Young*, *supra*, and also set forth a new test, one relying heavily on the Oregon Evidence Code.[10] *Lawson*, 352 Or at 761-762. Discussing showups, the *Lawson* court said:

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[10] To summarize: Under this revised test governing the admission of eyewitness testimony, when a criminal defendant files a pretrial motion to exclude eyewitness identification evidence, the state as the proponent of the eyewitness identification must establish all preliminary facts necessary to establish admissibility of the eyewitness evidence. *See* OEC 104 [comparable MRE 104]; OEC 307*. When an issue raised in a pretrial challenge to eyewitness identification evidence specifically implicates OEC 602 [comparable to MRE 602] or OEC 701 [comparable to MRE 702], those preliminary facts must include, at minimum, proof under OEC 602 that the proffered eyewitness has personal knowledge of the matters to which the witness will testify, and proof under OEC 701 that any identification is both rationally based on the witness's first-hand perceptions and helpful to the trier of fact.

If the state satisfies its burden that eyewitness evidence is not barred by OEC 402 [comparable to MRE 402], the burden shifts to the defendant to establish under OEC 403 [comparable to MRE 403] that, although the eyewitness evidence is otherwise admissible, the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or by considerations of undue delay or needless presentation of cumulative evidence. If the trial court concludes that the defendant opposing the evidence has succeeded in making that showing, the trial court can either exclude the identification, or fashion an appropriate intermediate remedy short of exclusion to cure the unfair prejudice or other dangers attending the use of that evidence. The decision whether to admit, exclude, or fashion an appropriate intermediate remedy short of exclusion is committed to the sound exercise of the trial court's discretion. *See State v. Cunningham*, 337 Or. 528, 536, 99 P.3d 271 (2004) (question whether relevant evidence should be excluded under OEC 403 because its probative value is substantially outweighed by the danger of unfair prejudice or other factors is reserved to the trial court's discretion).

Lawson, 352 Or at 761–62.

*OEC Rule 307. Allocation of the burden of producing evidence
(1) The burden of producing evidence as to a particular issue is on the party against whom a finding on the issue would be required in the absence of further evidence.
(2) The burden of producing evidence as to a particular issue is initially on the party with the burden of persuasion as to that issue.

> A "showup" is a procedure in which police officers present an eyewitness with a single suspect for identification, often (but not necessarily) conducted in the field shortly after a crime has taken place. Police showups are generally regarded as inherently suggestive—and therefore less reliable than properly administered lineup identifications—because the witness is always aware of whom police officers have targeted as a suspect. When conducted properly and within a limited time period immediately following an incident, a showup can be as reliable as a lineup. A showup is most likely to be reliable when it occurs immediately after the witness has observed a criminal perpetrator in action because the benefit of a fresh memory outweighs the inherent suggestiveness of the procedure.

Lawson, 352 Or. At 742–43.

Indeed, the *Lawson* court also expressed disapproval of a single suspect showup, noting, however, that a showup can be as reliable as a lineup if conducted properly within a limited time period after an incident. *Id*.

In *Wisconsin v Dubose*, 285 Wis 2d 143, 148; 699 NW2d 582 (Wis, 2005), the Wisconsin Supreme Court reversed the defendant's conviction, finding the two showups involving the victim and the defendant to have been unnecessarily suggestive and to have denied the defendant due process. *Dubose*, 285 Wis. 2d at 168. There, a showup had been conducted where the victim saw the defendant handcuffed in the back of a squad car, the police told the victim they might have caught one of the victim's assailants, and they conducted two more unnecessarily suggestive identification procedures at the police station – they conducted another showup and they showed the victim a single mug shot of the defendant.

Dubose, 285 Wis. 2d at 168–70.

The *Dubose* Court also adopted a new test:

> We conclude that evidence obtained from an out-of-court showup is inherently suggestive and will not be admissible unless, based on the totality of the circumstances, the procedure was necessary. A showup will not be necessary, however, unless the police lacked probable cause to make an arrest or, as a result

> of other exigent circumstances, could not have conducted a lineup or photo array. A lineup or photo array is generally fairer than a showup, because it distributes the probability of identification among the number of persons arrayed, thus reducing the risk of a misidentification. *See* Richard Gonzalez et al., *Response Biases in Lineups and Showups*, 64 J. of Personality & Soc. Psych. 525, 527 (1993). In a showup, however, the only option for the witness is to decide whether to identify the suspect.

Dubose, 285 Wis. 2d at 165–66 (footnote omitted).

In two Massachusetts cases, *Comm v Figueroa*, 468 Mass 204, 217; 9 NE3d 812 (Mass, 2014), and *Comm v Austin*, 421 Mass 357, 362; 657 NE2d 458 (Mass, 1995), the Supreme Judicial Court of Massachusetts upheld two suggestive identification procedures. It is not uncommon for that court to uphold such procedures. There is no reason for Michigan to follow Massachusetts down the path.[11]

The identification procedure used in this case was impermissibly suggestive and it was not necessary. The majority stated that the alternative to the procedure used would have been to keep an injured victim at the scene. That is not true. There were many alternatives. One alternative would have been to prepare a photo array using driver's license photos. Although not as easy for the police as preparing an array from mug shots, this could have been done. (MT, 63-64) Another alternative would have been to prepare a photo array using Mr. Thomas's driver's license photo and mug shots.[12] Another alternative would have been to ask Mr. Thomas if he would voluntarily accompany the police to the hospital for a live lineup, in order to be

[11] In *Figueroa*, an eyewitness was taken to a scene where he identified the defendant, who was standing next to a police car, flanked by two officers and handcuffed. *Figueroa*, 468 Mass at 217-218. The court found that the procedure was not so unnecessarily suggestive that it created a substantial risk of a mistaken identification. *Figueroa*, 468 Mass at 218. In *Austin*, two bank employees went through numerous identification procedures, including multiple photograph arrays and surveillance tape of the robbery of a different bank, and they ultimately identified the defendant as the man who attempted to rob the bank where they worked. *Austin*, 421 Mass at 359-362.

[12] The officer in charge testified that this is what would be done if the suspect had not been arrested and there was no mug shot, although the driver's license photograph would look different from mug shot photographs. (MT, 55-57)

eliminated as a suspect. Another alternative would have been to arrest Mr. Thomas, take a mug shot and prepare a photo array with mug shots. Another alternative would have been to arrest Mr. Thomas and put him in a live lineup. Another alternative would have been to arrest Mr. Thomas and take him to the hospital for a live showup.[13] The alternative that was used, merely because it was convenient for an inexperienced police officer, was so impermissibly suggestive that it created a substantial likelihood of misidentification and it violated Mr. Thomas's right to due process.

There is no case law holding that the single-photograph identification procedure used in this case is permissible. In addition, as noted by Judge Shapiro in his dissent, in neither of two recent reports issued by the State Bar of Michigan Eyewitness Identification Task Force is such a procedure set forth as acceptable. *Thomas*, dissent at 8. The procedure used in this case is "one of the most suggestive photographic identification procedures that can be used." *Gray*, 457 Mich 107. Both of the testifying officers, the one who showed Mr. Dykes the photograph and the officer in charge, indicated that showing only one photograph was suggestive (MT, 42, 62). Although the officer in charge might show a witness one photograph when the witness and the suspect lived next door to each other and the witness knew the suspect's name (MT, 62-63), she stated that there was no Detroit Police Department policy or procedure for showing a witness only one photograph. (MT, 61)

The majority never disputed the trial court's findings of fact. It never stated that any of the trial court's findings of fact were clearly erroneous or that it was left with the firm conviction

[13] Although the police officer who showed Mr. Dykes the photograph testified that police procedure would not have allowed a hospital showup (MT, 36-37), she also testified that she did not know proper photograph display procedure (MT, 37-38). Her estimations of what is and is not proper procedure are not necessarily credible.

that a mistake had been made. The majority seems to have decided that it was in a better position to review the testimony that the trial court had actually heard from a live witness that the trial court observed testifying. The majority decided that its conclusion was preferable to that reached by the trial court. The trial court's ruling was not clearly erroneous as a matter of fact or law and it should be affirmed.

II.

The complainant had no independent basis to identify Mr. Thomas in court.

Standard of Review

The standard of review is the same as the previous issue.

Discussion

While the majority of the Court of Appeals did not reach this issue, Judge Shapiro found in his dissent that the trial court's finding that there was no independent basis for the in-court identification was not clearly erroneous. *Thomas,* dissent at 12.

The prosecutor has the burden of showing by "clear and convincing evidence" that the in-court identification has a basis independent of the prior identification procedure. *Gray*, 457 Mich at 114-115. The independent basis inquiry is a factual one, and the validity of a victim's in-court identification must be viewed in light of the "totality of the circumstances." *Id.* at 116. Additionally, before the in-court identification may be received, the prosecution must prove by clear and convincing evidence that the in-court identification has a basis independent of the prior identification procedure. *United States v. Wade,* 388 US at 240. Thus, these requirements are both state and federal.

In *People v Kachar*, this Court listed eight factors to be used in determining if an independent basis for identification exists:

> 1. Prior relationship with or knowledge of the defendant;
>
> 2. The opportunity to observe the offense, including such factors as length of time or observations, lighting, noise or other factors affecting sensory perception and proximity to the alleged criminal act;
>
> 3. Length of time between the offense and the disputed identification;
>
> 4. Accuracy or discrepancies in the pre-lineup or showup description and defendant's actual description;
>
> 5. Any previous proper identification or failure to identify the defendant;
>
> 6. Any identification prior to the lineup or showup of another person as defendant;
>
> 7. The nature of the alleged offense and the physical and psychological state of the victim;
>
> 8. Any idiosyncratic or special features of the defendant.

Kachar , 400 Mich at 95-96.[14]

Mr. Dykes said he had seen his assailant for three seconds as they passed each other; he had no prior relationship or knowledge of Mr. Thomas. Mr. Dykes testified that the robbery transpired in six to seven seconds. There were no lights in the area of the two very brief encounters, it was dark, and the assailant was wearing black, which is hardly unique. The robber was half an arm's length away from Mr. Dykes during the robbery. "Although he was close, his ability to view the assailant was limited by the hood the assailant was wearing and by the fact that his attention was divided between the gun, his assailant's face and his assailant's clothing." *Thomas*, dissent at 12.

[14] In her opinion, the trial court noted that in *People v Gray*, this Court stated that not all eight factors will always be relevant to every case because the independent basis inquiry is a factual one. Moreover, a court may put lesser or greater weight on any factor, depending on the circumstances. Also, the eight factors are not exhaustive. Certain relevant facts may exist in a given case that do not fit neatly into one of the eight categories. *Gray*, 457 Mich at 117, n. 12.

Mr. Dykes was shown the photograph within an hour of the assault.

Mr. Dykes's initial description of the assailant was in the most general of terms: a black male, wearing dark clothing, with a youthful appearance. The discrepancy in the estimate of the assailant's weight, being either a slim 145 pounds or much heavier 200 pounds, was significant.

The record does not reflect any previous proper identification prior to the showing of the photograph of another person as the assailant.

The record does not reflect any identification prior to the lineup or showup of another person as the defendant.

The offense was assaultive. Mr. Dykes also testified that his·"adrenalin was up"·and he was highly emotional.

Mr. Dykes could not identify any idiosyncratic or special features of Mr. Thomas. His offering of contradictory testimony regarding the assailant's facial hair "demonstrated the fact that his memory was subject to alteration so as to conform to what he saw in the enlarged print."[15] The 55 pound difference in the estimate of the perpetrator's weight is significant.

The prosecution did not meet its burden of showing by "clear and convincing evidence" that Mr. Dykes's in-court identification of Mr. Thomas had a basis independent of the improper identification procedure. The assault happened quickly, in the dark, by an unknown person whose description by Mr. Dykes shifted subtly between the preliminary examination and the evidentiary hearing. Further, the description provided to Officer Howell could have described

[15] Exhibit 1 attached hereto is the enlarged print of the cell phone photo that was put into evidence at the Motion Hearing.

many young men in the area where Mr. Thomas was photographed. Taken as a whole, there was not a sufficient independent basis for the in-court identification of Mr. Thomas apart from the impermissibly and unnecessarily suggestive identification procedure.

The trial court's ruling suppressing the in-court identification was supported by the facts and evidence of this particular case and was not clearly erroneous. Its order should be affirmed.

CONCLUSION

In conclusion, Mr. Thomas asks that this Honorable Court reverse the decision of the Court of Appeals and affirm the dismissal of his case by the trial court.

Respectfully submitted,

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